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No. 77-1285

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

TOWNSHIP OF MIDLAND, a Municipal Corporation in Midland County, Michigan and ROBERT B. CHATTERTON, et al,

Appellants,

vs.

MICHIGAN STATE BOUNDARY COMMISSION,

Appellee,

and

CITY OF MIDLAND, a Municipal Corporation,

Intervening Defendant-Appellee,

et al.

On Appeal From the Supreme Court of Michigan

MOTION TO DISMISS OR AFFIRM

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No. 77-1285

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

TOWNSHIP OF MIDLAND, et al,

Appellants,

vs.

MICHIGAN STATE BOUNDARY COMMISSION, et al,

Appellees,

On Appeal From the Supreme Court of Michigan

MOTION TO DISMISS OR AFFIRM

City of Novi, intervening Defendant-Appellee, moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Michigan on the following grounds:

1. The Federal question sought to be reviewed was neither timely nor properly raised nor expressly passed on by the Supreme Court of Michigan.

2. The appeal does not present a substantial Federal question.

STATEMENT

This is an appeal from a Decision of the Supreme Court of Michigan entered on October 24, 1977, and an Order Denying Rehearing entered December 16, 1977 by the Supreme Court of Michigan. The Decision of the Michigan Supreme Court is reported at 401 Mich 641 (1977) and is set forth in Appellants' Appendix to Jurisdictional Statement (hereinafter referred to as the Appendix) at 60a-101a. The Order Denying Rehearing is set forth in the Appendix at 166a-167a.

The instant case is comprised of three (3) consolidated actions brought by Appellants in an attempt to overturn orders approving annexations entered by the State of Michigan Boundary Commission. Appellants challenged the sufficiency of certain procedural aspects of the Boundary Commission's proceedings and challenged the constitutionality of 1970 Public Act 219 (MCLA 117.9) as being violative of the Constitution of the State of Michigan. Appellants did not challenge the constitutionality of 1970 PA 219 as being violative of the Constitution of the United States until it filed its Application for Rehearing in the Michigan Supreme Court, which Application was denied without discussion of the issues raised.

The text of 1970 PA 219 is set forth in the Appendix at 168a-172a. This statute vests authority over annexation proceedings in the Michigan State Boundary Commission, a statutorily created state agency (MCLA 123.1001, et seq). 1970 PA 219 also sets forth the procedures to be followed in annexation proceedings, and incorporates the eighteen (18) statutory criteria which the Boundary Commission is required to consider in determining whether to approve or deny a proposed annexation (MCLA 123.1009). The approval of the Boundary Commission is required to effectuate all annexations. Final decisions of the Boundary Commission are subject to judicial review pursuant to state statute (MCLA 123.1018; MCLA 24.306) and pursuant to the State of Michigan Constitution (Michigan Constitution of 1963, Art 6, §28).

1970 PA 219 further provides that if a proposed annexation is approved by the Commission and there resides one hundred (100) persons or less in the area approved for annexation, the Commission's order shall not be subject to a referendum (Section 4; Appendix at 169a). If a proposed annexation is approved and more than one hundred (100) persons reside in the area approved for annexation, the Commission's order approving annexation is final in thirty (30) days unless, within that time, a proper petition for referendum is filed. If such a petition is filed, a referendum on the annexation is held (Section 5; Appendix at 169a).

In their appeal to this Court, Appellants challenge the constitutionality of 1970 PA 219 as being violative of the Fourteenth Amendment of the United States Constitution. Appellants now contend that the granting of a right of referendum for areas having a population of more than one hundred (100) persons and failing to provide for such a procedure in sparsely populated areas constitutes a denial of equal protection of the laws in violation of the Fourteenth Amendment.

This issue was not presented to nor passed upon by the Michigan Supreme Court. In the Michigan Supreme Court, 1970 PA 219 was only challenged as being violative of the Equal Protection provision of the 1963 Michigan Constitution (Art. 1, §2).

The Michigan Supreme Court held that 1970 PA 219 did not violate the Michigan Constitution, as no city, village, township or person has any vested right or legally protected interest in the boundaries of such governmental units and that the providing of an opportunity for referendum

where more than one hundred (100) persons reside in the territory to be annexed and denying a referendum where one hundred (100) persons or less reside in such territory bears a substantial relation to the object of the legislation (Appendix at 82a-86a).

Appellee, City of Novi, does not accept the Statement of the Case contained in Appellants' Jurisdictional Statement for reason that such Statement is replete with error. For example, Appellants erroneously state that the Novi annexation petition excluded a parcel of Novi Township to avoid a possible referendum (Appendix at 19a-20a). This is in error. However, this and numerous other errors contained in Appellants' Statement of the Case do not directly relate to the instant Motion and will not be discussed at this time.

There are, however, certain other errors contained in Appellants' Statement of the Case which are relevant to this Motion to Dismiss or Affirm.

At pages 15-16 of Appellants' Juridictional Statement, it is alleged that the Petition for Review filed in the Ingham County, Michigan, Circuit Court, with respect to the Novi proceeding challanged 1970 PA 219 as violating the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. To state it simply, this allegation is totally false. No such challenge was made to the subject statute based upon the United States Constitution.

At pages 22, 25 and 30, of their Jurisdictional Statement, Appellants state that in the Michigan Supreme Court, they argued that 1970 PA 219 violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Again, this allegation is totally false.

The first time that any Federal constitutional question was presented to the Michigan Supreme Court was in Appellants' Application for Rehearing, which Application was denied without opinion by the Michigan Supreme Court.

Appellee, City of Novi, submits that the Federal question sought to be reviewed herein was neither timely nor properly raised nor expressly passed on by the Michigan Supreme Court.

Appellees further submit that the instant appeal does not present a substantial Federal question, for reason that the point of law ought to be reviewed by Appellants has been clearly decided heretofore by this Court, by other courts in the federal judicial system and by numerous state courts, all contrary to Appellants' position.

ARGUMENT

I.

THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS NEITHER TIMELY NOR PROPERLY RAISED NOR EXPRESSLY PASSED ON BY THE SUPREME COURT OF MICHIGAN. THIS COURT IS WITHOUT JURISDICTION OF THIS CASE UNDER 28 U.S.C. § 1257 (2).

Each of the consolidated cases at bar was commenced by the filing of a Petition for Review filed in the Circuit Court for the County of Ingham, Michigan. With respect, at least, to the Novi proceeding, Appellants did not challenge the constitutionality of 1970 PA 219 as being violative of the United States Constitution (Appellants admit that the Decisions of the Trial Court and Michigan Court of Appeals were based upon state constitutional grounds. See Jurisdictional Statement at 21, 22).

As such, even if Appellants had attempted to raise such an issue in the Michigan Supreme Court, the Court would not have considered it, for reason that under Michigan jurisprudence, issues not raised at the trial court level will

not be considered on appeal. *Grossman Building Co.* v. *Elliott,* 382 Mich 596, 171 NW2d 441 (1969); *Therrian* v. *General Laboratories, Inc.,* 372 Mich 487, 127 NW2d 319 (1964).

However, Appellants did not raise a Federal constitutional issue before the Michigan Supreme Court. There is no allegation in the Townships' Brief to the Michigan Supreme Court that 1970 PA 219 is violative of the United States Constitution. Instead, this statute was attacked only on the Equal Protection provision of the 1963 State of Michigan Constitution. This is clearly evidenced at page 17 of the Townships' Brief of Cross-Appellants in the Michigan Supreme Court wherein the Townships alleged as follows:

> "... Where such referendum rights are tendered to some and denied to others whose situation is not distinguishable on rational grounds there is violation of Art. 1, § 2 of the 1963 Michigan Constitution, which guarantees equal protection under the law."

Nowhere, in any of the Briefs filed by Appellants in the Michigan Supreme Court prior to the hearing of this cause was any provision of the United States Constitution even cited as an authority.

On October 24, 1977, the Michigan Supreme Court issued its Decision in this case. There is no indication, much less an express statement, that Appellants' equal protection argument was considered and decided under the United States Constitution.

Appellants thereupon filed an Application for Rehearing in the Michigan Supreme Court, wherein, for the first time, it was alleged that 1970 PA 219 was violative of the Equal Protection provision of the United States Constitution. (In this regard it is of importance to recognize that the *only* pleadings which Appellants saw fit to include in their Appendix to this Court was the Application for Rehearing

filed in the Michigan Supreme Court and the Brief in Support thereof.)

On December 16, 1977, the Michigan Supreme Court denied Appellants' Application for Rehearing, stating:

> "In this cause an application for rehearing and a motion for stay order are considered and they are hereby DENIED." (Appendix at 166a-167a)

It is clear that the Federal constitutional issue which Appellants are attempting to raise in their appeal to this Court was not drawn into question in the state Court so as to vest jurisdiction of this appeal in this Court pursuant to 28 U.S.C. § 1257 (2).

This Court has consistently held that it is without jurisdiction where the Federal question sought to be reviewed was raised for the first time in a petition for rehearing in the highest court of the state and the rehearing was denied without an express determination of the Federal question. See *McMillen* v. *Ferrum Mining Company,* 197 U.S. 343 (1904); *Rooker* v. *Fidelity Trust Company,* 261 U.S. 114 (1922); *Herndon* v. *State of Georgia,* 295 U.S. 441 (1935); *Chicago, Indianapolis and Louisville Railway Company,* 196 U.S. 128 (1905); *Forbes* v. *State Council of Virginia,* 216 U.S. 396 (1910) and the authorities cited in these cases.

In the case at bar, the Federal question sought to be reviewed herein was raised for the first time in the Application for Rehearing in the Michigan Supreme Court which denied the Application without a determination of the Federal question. This Court is without jurisdiction of the instant action.

Appellants may raise certain arguments in an attempt to establish jurisdiction in this Court.

Appellants may argue that because the Michigan Constitution contains an equal protection provision which is sim-

ilar to the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, the Decision of the Michigan Supreme Court was also based upon the Federal Constitution so as to vest jurisdiction in this Court.

Such an argument must fail. This Court has consistently held that the basis of jurisdiction in this Court must be clear and unmistakable and where there are similar provisions in a State and Federal Constitution, it is presumed that reliance is placed only upon the State Constitution, unless reliance upon the Federal Constitution is specifically enumerated.

In the case of *Bowe* v. *Scott,* 233 U.S. 658, 663 (1913) no assertion of rights under the United States Constitution was made until a Petition for Review was filed in the highest court of the state. This Court stated with respect to the question of its jurisdiction:

> "It is further urged that be this as it may there is no jurisdiction because no assertion of rights under the Constitution was made below until the petition for rehearing which was too late and the tardiness of which was not saved by the action of the Court since it simply declined to grant the rehearing without deciding the questions presented as the basis of the request for rehearing. As it is elementary that a mere assertion in a state court of a right under the Constitution of the United States in a petition for rehearing affords no ground for invoking the jurisdiction of this Court unless the Court below in dealing with the petition for rehearing considers and passes upon the Federal ground therein relied upon, we dismiss that subject from view and some to consider whether the record otherwise discloses that a Federal question was so raised below as to support our jurisdiction . . ."

In attempting to sustain the Court's jurisdiction, Appellant, in *Bowe,* claimed that it had timely alleged that the

ordinance in question deprived him of property "without due process of law." In rejecting this contention and dismissing the case for want of jurisdiction, the Court, in *Bowe,* stated at 233 U.S. 664-665:

> "The other passage in the bill is found in subdivision 'c' of the tenth paragraph and is as follows:
>
> 'That the ordinance is an attempt to take from your complainants whose property adjoins and abuts upon the said alley their rights in and to said alley without due process of law.' But it is settled that such an averment making no reference to the Constitution of the United States and asserting no express rights thereunder is solely referable to the state constitution, which in this instance has a due process clause, and affords no basis whatever for invoking the jurisdiction of this Court. *Miller* v. *Cornwall R.R. Co.,* 168 U.S. 131, 134; *Harding* v. *Illinois,* 196 U.S. 78.' "

In the case of *Gibbes* v. *Zimmerman,* 290 U.S. 326, 328 (1933), this Court stated with respect to a contention similar to that raised in *Bowe* v. *Scott, supra.*

> ". . . The Appellant, who was Plaintiff in the suit, asserts that the Act impairs the obligation of contract, in violation of the Constitution of the United States. We cannot consider this contention, since in his pleading, the Appellant relied solely on the provisions of the state constitution with respect to the obligation of contracts, and made no reference to Section 10 of Article 1 of the Federal Constitution; and the Supreme Court, in disposing of the case, did not mention or discuss that section. R. S. § 709; U.S.C. Tit. 28, § 344; *Chicago & N.W. Ry. Co.* v. *Chicago,* 164 U.S. 454, 457; *Levy* v. *Superior Court,* 167 U.S. 175, 177; *Miller* v. *Cornwall R. Co.,* 168 U.S. 131 ,134; *Bowe* v. *Scott,* 233 U.S. 658, 665."

Also see *Miller* v. *Cornwall R. Co.,* 168 U.S. 131, 134 (1897).

In the instant case, Appellants attack upon 1970 PA 219 under the Michigan Constitution does not serve as an attack upon that statute under the United States Constitution so as to vest jurisdiction in this Court.

Appellants may also allege that jurisdiction is vested in this Court because the Michigan Supreme Court cited a Federal case, *Hunter* v. *City of Pittsburgh,* 207 U.S. 161 (1907), in rendering its Decision, and therefore the Michigan Supreme Court must have been interpreting the United States Constitution.

Again, such an allegation would be without merit. This Court has held that a Federal question must appear with certainty to vest jurisdiction in this Court and citation of or reliance upon a Federal case in a state court Decision does not mean that such Decision was based upon the United States Constitution nor that a Federal question was raised.

In the case of *Levy* v. *Superior Court of San Francisco,* 167 U.S. 175, 177-178 (1896), this Court stated in dismissing the writ of error for want of jurisdiction:

> "* * * The plaintiff claimed, in the state court, that certain provisions of the state enactment referred to were repugnant to the constitution of California. But he did not, in the state court, draw in question any statute of the State upon the ground that it was repugnant to the Constitution of the United States, * * * He insists, in this court, that the enforcement of the above statutory provisions was a denial of the equal protection of the laws — a denial forbidden by the Fourteenth Amendment of the Constitution of the United States. But the record does not show that he made any such claim in the state court. The reference in the opinion of that court to the cases of *Boyd* v. *United States* and *Counselman* v. *Hitchcock* was for the purpose of ascertaining the proper construction of certain provisions of the constitution of California, not as defining rights asserted by the plaintiff under the Constitution of the United States. From the pleadings in the cause the state court had no reason to suppose that the plaintiff specially claimed that the statute in question deprived him of any right secured by the Constitution of the United States. We said in *Oxley Stave Co.* v. *Butler County,* 166 U.S. 648, that "the jurisdiction of this court to reexamine the final judgment of a state court cannot arise from inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right." See also *Louisville & Nashville Railroad Co.* v. *City of Louisville,* 166 U.S. 709. If the plaintiff intended to claim that the statute in question was repugnant to the Constitution of the United States, he should have so declared."

Also see *Osborne* v. *Clark,* 204 U.S. 565 (1907).

Finally, Appellants may argue that because the Michigan Supreme Court stated in its Order denying Appellants' Application for Rehearing that the Application was "considered", the Federal question was ruled upon.

Such an allegation would be without merit. This Court has held that an indication of "consideration" in an order denying rehearing does not satisfy the requirement that the Federal constitutional question was ruled upon so as to vest jurisdiction in this Court. Typical of these cases is *Forbes* v. *State Council of Virginia,* 216 U.S. 396, 398-399 (1910) wherein this Court stated in dismissing the writ of error:

> "An inspection of the record shows that no claim of the rights now asserted under the Federal Constitution was made until the petition for rehearing was filed after the judgment in the state court of final resort . . .
>
> "In passing upon the petition for rehearing, the supreme court of appeals of Virginia said: 'On mature consideration of the petition of the plaintiffs in error to set aside the judgment entered herein on January

16, 1908, and to grant a rehearing of said cause, the prayer of said petition is denied.'

"It has been many times held in this court that an attempt to introduce a Federal question into the record for the first time by a petition for rehearing is too late. *Loeber* v. *Schroeder,* 149 U.S. 580, 585, 37 L.ed. 856, 859, 13 Sup. Ct. Rep. 934; *Pim* v. *St. Louis,* 165 U.S. 273, 41 L.ed. 714, 17 Sup. Ct. Rep. 322."

"There is an exception to this rule when it appears that the court below entertained the motion for rehearing, and passed upon the Federal question. But it must appear that such Federal question was in fact passed upon in considering the motion for rehearing; if not, the general rule applies. (citing cases)

"But, it is alleged, the memorandum which we have quoted shows that the Virginia Court must have considered and passed upon the Federal question made in the petition for a rehearing. Except that the order is said to be upon mature consideration, it is almost word for word the order on rehearing reviewed in *McCorquodale* v. *Texas,* 211 U.S. 432, 53 L.ed. 269, 29 Sup. Ct. Rep. 146, which was held to amount to no more than a denial of the motion. See 211 U.S. 437. In that case the rule was again laid down that it was too late to raise a Federal question upon a petition for rehearing, unless the Federal question was passed upon in ruling upon the petition."

Appellee, City of Novi, submits that the Federal question sought to be reviewed was neither timely nor properly raised nor expressly passed on by the courts of Michigan. This Court should dismiss the appeal for want of jurisdiction.

II.

THE INSTANT APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Appellee, City of Novi, submits that this Court is without jurisdiction to hear the instant appeal. However, arguendo, even if such jurisdiction exists in this Court, this Court should dismiss this appeal or, in the alternative, affirm the Decision of the Michigan Supreme Court, for reason that the instant appeal presents no substantial Federal question.

A. The Subject Of Annexation Is Strictly A Political Question Which Is Not Subject To Constitutional Prohibitions.

In the case at bar, the Michigan Supreme Court did not address Appellee's contention that annexation proceedings were not subject to state constitutional prohibitions, including the Equal Protection Clause (Appendix, 86a, footnote 25).

This question was, however, addressed by the Michigan Court of Appeals in the instant case which stated as follows:

> "Several arguments are presented as to how this classification is unconstitutional or otherwise illegal. None are persuasive. The question of annexation is strictly a political one — a matter for the Legislature to regulate — and is not subject to constitutional prohibitions. *Detroit Edison Co.* v. *East China Twp. School District No. 3,* 378 F2d 225 (CA 6, 1967). Even if it were, the classification based on population would be valid as having a rational basis. See *Tribett* v. *Village of Marcellus,* 294 Mich. 607; 293 NW 872 (1940)." (Appendix 57a-58a)

This holding of the Michigan Court of Appeals is correct with respect to the Michigan Constitution and is equally valid with respect to the United States Constitution. Beginning with the case of *Hunter* v. *City of Pittsburgh,* 207 U.S. 161 (1907), this Court, lower Federal Courts and state courts have held that annexation proceedings are strictly political in nature and are not subject to Federal constitutional prohibitions. It is solely within the discretion of the state to legislate in this area and any grievance or injustice that results therefrom must find relief under state law.

This Court stated in *Hunter* at 207 U.S. 178-179:

> "Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. . . . The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. . . . The State, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. . . . The power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it."

Appellants argue that *Hunter* is no longer viable in light of this Court's Opinion in the case of *Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960). In *Gomillion,* the boundaries of the City of Tuskegee, Alabama, were altered by state act from a square to an "uncouth 28 sided figure", allegedly for the purpose of denying petitioners, Negro citizens of the City of Tuskegee, the right to vote. This Court held such action by the state to be violative of the Fifteenth Amendment of the United States Constitution, as constituting invidious discrimination resulting in the denial of the right to vote on account of color.

Although *Gomillion* is not an annexation case, it has been considered in numerous annexation cases, with the party opposing annexation arguing that in light of *Gomillion, Hunter* v. *City of Pittsburgh,* is no longer sound authority. Such an argument has consistently been rejected. The Courts have adhered to the *Hunter* doctrine in holding that annexation procedures are within the sole discretion of the state and such procedures are not subject to Federal constitutional prohibitions.

In the case of *Detroit Edison Company* v. *East China Township School District No. 3,* 378 F.2d 225 (6th Cir.), cert. denied, 389 U.S. 932 (1967), an annexation of two school districts to a third school district in which Plaintiffs owned property was alleged to violate the Equal Protection Clause of the Fourteenth Amendment for reason that the statute in issue provided for annexation upon approval of voters in the annexed area but was not subject to the approval of voters in the annexing district.

In *Detroit Edison,* the Sixth Circuit Court of Appeals, in affirming the District Court's dismissal of Plaintiffs' Complaint, held that the Equal Protection Clause of the Fourteenth Amendment did not apply to annexation procedures, as the alteration of municipal boundaries is a matter solely within the discretion of the state and is not confined by rights secured by the Federal Constitution.

In so holding, the Court of Appeals quoted extensively from *Hunter* v. *City of Pittsburgh, supra,* and then stated at 378 F. 2d 229:

> "Two other Circuits, the Fifth and Tenth, have had occasion to pass on cases where the constitutionality of a state annexation procedure was raised. As the District Court noted, both Courts of Appeals relied on *Hunter* v. *City of Pittsburgh* in affirming dismissals of their respective cases." [citing *Hammonds* v. *City of Corpus Christi,* 343 F. 2d 162 (5th Cir.), cert. denied, 382 U.S. 837, (1965); *International Harvester Co.* v. *Kansas City,* 308 F. 2d 35 (10th Cir. 1962), cert. denied, 371 U.S. 948, (1963)].
>
> "With respect to the annexation issue, plaintiffs' reliance on the relatively recent apportionment cases is misplaced. . . . However, as the District Court noted, the reapportionment cases 'create no constitutional rights in affecting citizens concerning the *procedure* for creating or altering' any type of state district. The judgment of the District Court with respect to the annexation issue will hereinafter be affirmed; reference is made to the well reasoned opinion of District Judge Theodore Levin reported at 247 F. Supp. 296, wherein the cases of *Gomillion* v. *Lightfoot,* 364 U.S. 339, 81 S. Ct. 125, 5 L.Ed. 2d 110 (1960) and *Carrington* v. *Rash,* 380 U.S. 89, 85 S. Ct. 775, 13 L.Ed. 2d 675 (1969) are shown to be inapposite." (Emphasis in original)

In the *Detroit Edison* case, the Sixth Circuit referred specifically to the District Court's Opinion with respect to that Court's discussion of the case of *Gomillion* v. *Lightfoot, supra.* The District Court's Opinion is reported at 247 F. Supp. 296 (1965) wherein the Court set forth a detailed examination of annexation procedure cases with respect to the Fourteenth Amendment and discussed apportionment cases such as *Gomillion.* The District Court demonstrated that the *Hunter* doctrine is still as viable as ever and that annexation procedures were not within the

purview of the Federal Constitution. The Court stated as follows:

> "Any alteration of municipal boundaries is a matter within the complete discretion of the state and not confined by any rights secured by the federal constitution. *Hunter* v. *City of Pittsburgh,* 207 U.S. 161, 28 S. Ct. 40, 52 L. Ed. 151 (1907) . . ."
>
> "Recently, the Supreme Court had an occasion to limit this broad language to the specific provisions considered in Hunter — the impairment of contracts and due process. In *Gomillion* v. *Lightfoot,* 364 U.S. 339, 81 S. Ct. 125, 5 L. Ed. 2d 110 (1960), the Court held that a complaint stated a cause of action when it alleged alterations in the boundaries of Tuskegee, Alabama, disenfranchised Negroes in violation of the Fifteenth Amendment. The Hunter rule is not an absolute, the Court said, and must yield to the specific limitation of the Fifteenth Amendment."
>
> "*Gomillion* does not diminish the authority of Hunter in annexation *procedure* cases. The Court specifically characterized the problem as the municipal disenfranchisement of Negroes. In fact, the Court rejected the plaintiffs contention based on the equal protection provision. Both the Fifth and Tenth Circuits have subsequently held that Hunter forecloses a challenge to an annexation procedure based on the equal protection provision. Hammonds v. City of Corpus Christi, Texas, 343 F.2d 162 (5th Cir. 1965), cert. den., 86 S. Ct. 85 (Oct. 11, 1965), affirming 226 F. Supp. 456 (S.D. Tex. 1964); International Harvester Company v. Kansas City, 308 F.2d 35 (10th Cir. 1962). State courts have reached a similar conclusion. In School Dist. of City of Lansing v. State Board of Education, 367 Mich. 591, 116 N.W. 2d 866 (1962), the Michigan Supreme Court rejected an argument almost identical to that of the plaintiffs here in connection with another provision of the Michigan School Code." (Emphasis in original)

"Plaintiffs' main argument is that Hunter v. City of Pittsburgh 'is no longer law insofar as it is inconsistent in theory with [the reapportionment cases] . . .'"

"Much uncertainty surrounds the effect of the reapportionment decisions on local government. A threshold question is whether the equal protection clause applies to *any* municipal problems, even reapportionment of representative legislative bodies." (Emphasis in original)

"The Supreme Court has not specifically extended the application of the equal protection clause beyond the composition of state legislatures and justiciability may well be limited to the state . . ."

"The Supreme Court may have resolved the issue in favor of limiting the equal protection clause. Griffing v. Bianchi, 86 S. Ct. 52 (Oct. 11, 1965). A three-judge district court had found the Suffolk County Board of Supervisors completely malapportioned. Although the court declined to act until the political agencies had an opportunity to create an appropriate governing body, it refused to dismiss the complaint because it concluded that the equal protection tests applied to the controversy. The Supreme Court disposed of the appeal with these words: 'The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction.' Perhaps the dispute is not over, but it would seem that the Supreme Court does not, at this time, see fit to extend the courts' involvement in this area."

"It is unnecessary for the court to attempt to resolve the fundamental issue, and it is sufficient to note the present uncertainty; for even if the equal protection clause applies to local government reapportionment problems, it does not follow that annexation procedures raise a justiciable issue."

"The right at stake in the reapportionment cases is that, in state representative government, the weight

of the vote of a citizen in one electoral district be approximately equal to the weight of another citizen's vote in any other electoral district. A state may not create electoral districts which have a population disparity. But this is the only limitation the cases place upon the legislative power of a state to define political boundaries. They create no constitutional rights in affected citizens concerning the *procedure* for creating or altering these districts. Even where the Court has held electoral district boundaries must be altered, it has failed to establish a specific *procedure* to accomplish this. Reynolds v. Sims, 377 U.S. 533, 585, 84 S. Ct. 1362, 12 L.Ed. 2d 506 (1964) . . ." (Emphasis in original)

• • •

"Far from implying a change in the Hunter doctrine, the reapportionment cases seem to reaffirm it. In Reynolds v. Sims, supra, the leading case in which the Supreme Court held that both houses of a bicameral legislature must be apportioned on a population basis, Chief Justice Warren quoted from Hunter with apparent approval:

> 'Political subdivisions of States — counties, cities or whatever — never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in Hunter v. City of Pittsburgh, 207 U.S. 161, 178 [28 S. Ct. 40, 52 L.Ed. 151], these governmental units are ' created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them,' and the 'number, nature, and duration of the powers conferred upon [them] • • • and the territory over which they shall be exercised rests in the absolute discretion of the state.' 377 U.S. 533, 575, 84 S. Ct. 1362, 1388.'"

• • •

"Any lingering doubts about the vitality of Hunter in the wake of the reapportionment cases should have been dispelled when the Supreme Court denied certiorari in Hammonds v. City of Corpus Christi, Texas, supra. That case is similar to this one. . . . The lower courts dismissed the complaint, relying on Hunter. While the denial of certiorari is, of course, not necessarily an agreement with the opinion below, this denial is significant in light of the Supreme Court's actions in voting cases."

"The foundation on which the Hunter doctrine has stood for half a century on the issue of annexation procedure is as sturdy as ever. This court holds, therefore, that the school district annexation procedure of the Michigan School Code, which was followed by the original East China District in forming the combined district, is a purely legislative matter. It is not justiciable under the due process or the equal protection clauses of the Fourteenth Amendment to the federal constitution."

The holding in *Detroit Edison* finds clear support in other annexation cases decided after *Gomillion* such as *Hammonds* v. *City of Corpus Christi,* 343 F.2d 162 (5th Cir) cert. denied, 382 U.S. 837 (1965) wherein the court found no error in the District Court's dismissal of the complaint on the ground, among others, that:

> "The annexation of lands to a city has been held without exception to be purely a political matter, entirely within the power of the State Legislature to regulate."

Similarly, in the case of *International Harvester Co.* v. *Kansas City,* 308 F. 2d 35 (10th Cir. 1962) cert. denied, 371 U.S. 948 (1963) the Court, after quoting from *Hunter,* stated:

> "Neither the due process clause nor the concept of equal protection is available to persons seeking to obstruct the ordinary and necessary exercise of a state's political functions."

Also see *Deane Hill Country Club, Inc.* v. *City of Knoxville,* 379 F. 2d. 321 (6th Cir.), cert. denied, 389 U.S. 975 (1967).

Appellee, City of Novi, acknowledges that the case of *Adams* v. *City of Colorado Springs,* 308 F. Supp. 1397, aff'd. mem., 399 U.S. 901 (1970), holds that annexation proceedings are subject to equal protection scrutiny. However, such a holding is in the distinct minority and with respect to this particular issue, does not set forth the clear reasoning and detailed examination of cases which was done in *Detroit Edison* and similar cases.

Appellee, City of Novi, submits that the instant case, in which a challenge is made to annexation procedures of the State of Michigan, does not concern rights which are protected by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Appellee, City of Novi, submits that there exists no substantial Federal question and that the instant appeal should be dismissed, or in the alternative, that the Decision of the Michigan Supreme Court should be affirmed.

B. Even If, Arguendo, Annexation Procedures Do Come Within Equal Protection Safeguards, The Annexation Procedure Challenged In The Instant Case Does Not Involve Fundamental Rights So As To Necessitate A Showing Of A Compelling State Interest And Need Only Meet The Test Of Having A Reasonable Basis For Classification.

In considering challenges to statutory enactments based upon the Equal Protection Clause, this Court has traditionally determined whether the statutory scheme involves a "fundamental" right. If a fundamental right is involved, the constitutionality of the statute is judged by

whether the statute promotes a compelling state interest. If a fundamental right is not involved, equal protection will be deemed to have been denied only if the classification is without a reasonable basis. *Shapiro* v. *Thompson,* 394 U.S. 618 (1969).

In the case at bar, Appellants contend that the issue before the Court involves a denial of fundamental voting rights so as to require a showing of a compelling state interest to justify the Michigan statutory annexation procedure. In making this argument, Appellants rely upon cases such as *Kramer* v. *Union School District No. 15,* 395 U.S. 621 (1969); *Cipriano* v. *City of Houma,* 395 U.S. 186 (1962); *Dunn* v. *Blumstein,* 405 U.S. 330 (1972); and *Evans* v. *Cornman,* 398 U.S. 419 (1970).

None of the cases relied upon by Appellants involve annexations. None of the cases relied upon by Appellants hold that annexation procedures involve fundamental voting rights. Further, all of the cases relied upon by Appellants have been held to be inapplicable to annexation proceedings.

The instant case does not involve fundamental voting rights nor does it involve invidious discrimination against an identifiable group.

The issue raised by Appellants, properly stated, is whether it is constitutionally permissible to determine whether an election is to be held at all based upon the number of residents in an area proposed to be annexed. See *Weber* v. *City Council of Thousand Oaks,* 9 C. 3d 940, 513 P2d 601 (1973). Such an issue does not involve fundamental voting rights. In the *Weber* case, the California annexation statute did not provide for the right to vote where the area to be annexed contained less than twelve (12) residents while a vote was permitted where the area to be annexed contained twelve (12) or more residents.

In *Weber,* the California Supreme Court, in upholding the constitutionality of the statute against an equal protection challenge, held that as the legislature could constitutionally have provided that all annexations to cities be accomplished without a vote of the residents of the territory to be annexed, the statutory procedure did not involve a deprivation of the fundamental right to vote calling for justification on the basis of a compelling state interest. In so holding, the California Supreme Court distinguished many of the cases relied upon by Appellants in the case at bar.

The Court, in *Weber,* stated at 9 C. 3d 959:

> "Plaintiffs contend that the legislative distinction between annexations of inhabited and uninhabited territory impairs their fundamental interest in their right to vote. They argue that the withholding of any opportunity to vote on annexation from groups of 11 or fewer resident voters while granting the right to more numerous groups is an infringement of the right to vote demanding close scrutiny and requiring the justification of a compelling state interest. They rely on decisions of the United States Supreme Court applying the strict test and invalidating classifications which selectively excluded particular classes of voters from participation in elections even though their interest in the outcome was as substantial as that of the persons who were permitted to vote."

The *Weber* Court then distinguished the cases of *Kramer* v. *Union School District, supra, Cipriano* v *City of Houma, supra, Carrington* v. *Rash,* 380 U.S. 89 (1969) and *Gomillion* v. *Lightfoot, supra,* stating as follows at 9 C. 3d 960:

> "All of the foregoing cases are distinguishable on the ground that in each instance the classification was designed to exclude from an election an 'identifiable class' of electors. [*Gordon* v. *Lance* (1971) 403 U.S. 1, 7 (29 L.Ed.2d 273, 277, 91 S. Ct. 1889).] When the

exclusion could not be justified on the ground that it served a compelling state interest it was held to deny equal protection of the laws. *In the instant case no issue of the exclusion of a class from participation in an election is raised; the issue instead is whether the inclusion or exclusion of any election as part of an annexation proceeding can justifiably be made to depend on the number of resident registered voters.*" (Emphasis Added)

The Court, in *Weber,* also distinguished voting rights cases such as *Harper* v. *Virginia Bd. of Elections,* 383 U.S. 663 (1966), in stating:

> "Each of these decisions, including *Curtis,* [Curtis v. Board of Supervisors, 7 Cal. 3d 942, 501 P2d 537 (1972)] involves an unconstitutional impairment of voting rights in elections actually provided for by state law, as distinct from the claim now advanced by plaintiffs that it is unconstitutional for the Legislature not to have provided for an annexation election in the circumstances of the instant case although providing for it in other circumstances."
>
> "As the Legislature could contitutionally have provided that all annexations to cities be accomplished without a vote of the residents of the territory proposed to be annexed, and as the 1939 act provides for annexation without an election, the instant case involves no deprivation of or limitation on the fundamental right to vote calling for close scrutiny or justification on the basis of a compelling state interest."

The Court, in *Weber,* also recognized that its holding was consistent with the holdings in other cases where citizens in an area to be annexed were not permitted to vote on an annexation while the applicable statute provided for referenda for annexations under certain other sets of circumstances. *Adams* v. *City of Colorado Springs,* 308 F. Supp. 1397 (D.C. Col) aff'd mem, 399 U.S. 901 (1970); *Murphy* v. *Kansas City, Missouri,* 347 F. Supp. 837 (W.D. Mo., 1972); *Garren* v. *City of Winston-Salem,* 463 F. 2d 54 (4th Cir., 1972).

In *Adams* v. *City of Colorado Springs, supra,* a right to referendum on annexation proceedings was permitted in the area to be annexed only where there was at least 1/6 but not more than ⅔ contiguity with the annexing municipality. In holding that such a statutory scheme did not involve the fundamental right to vote so as to require strict scrutiny by the Court, the Court distinguished those cases relied upon by Appellants in the case at bar, stating as follows at 308 F. Supp. 1402-3:

> "Plaintiffs seek to equate their position with that of the plaintiffs in the several voting rights cases. (citing cases) . . ."
>
> "On its face this argument appears to have merit in that the right to vote poses a sensitive constitutional issue demanding scrupulous evaluation. However, on a closer look, it does not appear that the plaintiffs' rights are of the kind that have been upheld by the Supreme Court. The factor present in the cited cases which appears to have been crucial is that the franchise was granted to one group of persons to the detriment of another group. In most instances one group had votes with disproportionate weight as opposed to a group which was partially or wholly disenfranchised, or there has been a purposeful juggling of boundaries for the purpose of excluding a particular group. *Gomillion* v. *Lightfoot,* supra . . . In the case at bar none of the described conditions are present and so it cannot be said that there exists the invidious discrimination which has been heretofore condemned by the Supreme Court. Hence, the only question which qualified for consideration is whether the Assembly's classification is palpably irrational and, hence, constitutionally intolerable."

In the case of *Thompson* v. *Whitely,* 344 F. Supp. 480 (E.D.N.C., 1972), the applicable statute provided that where the annexing municipality had less than 5,000 residents, no vote on the annexation was permitted in the area to be annexed. Certain towns and counties were exempted from this procedure. In these instances a vote was required in the area to be annexed if requested by at least fifteen (15%) percent of the voters of such area. In holding that this statutory procedure did not involve fundamental voting rights, the Court, in *Thompson,* stated:

> "Plaintiffs claim, however, that the usual presumption of reasonableness is not applicable here because the statutory scheme in question denies them a fundamental right — the right to vote . . . We agree with plaintiffs that they suffer discrimination by this statutory scheme. Although the state could have denied the vote to all residents as to annexation, see *Hunter, supra,* it has not chosen to do so. By allowing some residents to vote, the state has created a 'right' which may not be denied others in violation of the United States Constitution . . . We believe, however, that the right to vote in the present case is not a fundamental right evoking the stricter standard of review. Unlike the right to vote called 'fundamental' by the United States Supreme Court, *Yick Wo* v. *Hopkins,* 118 U.S. 356, 370, 6 S. Ct. 1064, 30 L.Ed. 220 (1885); *Reynolds* v. *Sims,* 377 U.S. 533, 561-562, 84 S. Ct. 1362, 12 L.Ed. 2d 506 (1964); *Harper, supra,* 383 U.S. at 667-668, 86 S. Ct. 1079, 16 L.Ed. 2d 169; the right to vote in the referendum here does not relate except indirectly to participation in representative government. . . . Therefore we apply to this case the 'traditional standard' of review, under which 'equal protection is denied only if the classification is 'without any reasonable basis'. *Shapiro, supra,* 394 U.S. at 638 n. 20, 89 S. Ct. at 1333."

Also see *Garren* v. *City of Winston Salem,* 463 F. 2d 54 (4th Cir., 1972); *Murphy* v. *Kansas City, Missouri,* 347 F. Supp. 837 (W. D. Mo., 1972).

The case of *Town of Lockport, New York* v. *Citizens for Community Action at the Local Level, Inc.,* 430 U.S. 259 (1977) is relied upon by the instant Appellants, but is, in fact, precisely in accord with Appellee's position. In *Lockport,* New York provided that a new county charter would go into effect only if approved in an election by separate majorities of the voters who live in the cities within the county and of those who live outside the cities. The proposed charter in *Lockport* received a combined majority approval, but not separate majority approval.

This Court, in *Lockport,* upheld the validity of the statute against an equal protection challenge. In so holding, this Court did not seek a compelling state interest to justify the statutory classification, but instead, afforded the statute "the presumption of constitutionality to which every duly enacted state and federal law is entitled" (*Lockport,* at 430 U.S. 272), and found the classification not to violate the Equal Protection Clause of the Fourteenth Amendment.

This Court, in *Lockport,* also expressly recognized that a similar statutory classification in the context of annexation proceedings would not be violative of the Equal Protection Clause. (430 U.S. at 271).

The Michigan statutory annexation procedures do not involve a denial of "fundamental" rights so as to require the demonstration of a compelling state interest to satisfy constitutionality. 1970 PA 219 is constitutional if it has a reasonable basis.

C. There Is No Substantial Federal Question As To Whether The Annexation Procedures Challenged In The Instant Case Bear A Reasonable Relation To The Objects Of The Legislation.

This Court has held:

> "that the Fourteenth Amendment permits the states a wide scope of discretion in enacting laws which ef-

fect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland*, 366 U.S. 420, 425-426 (1961).

It has also been held that there is nothing constitutionally prohibited in classification per se; it is only when there is no reasonable state of facts to sustain such classification, thereby making the classification arbitrary and without a reasonable basis, that equal protection is deemed to be denied. *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974); *Atlanta Bowling Center, Inc.* v. *Allen*, 389 F. 2d 713 (5th Cir., 1968); *Alkire* v. *Cashman*, 350 F. Supp. 360, aff'd. mem., 377 F. 2d 480 (1972).

In the case at bar, Appellants challenge the statutory classification permitting referenda on annexations where more than one hundred (100) persons reside in the area to be annexed and denying the right to a referendum on a proposed annexation where less than one hundred (100) persons reside in the area to be annexed.

In affirming the constitutionality of this procedure under the Equal Protection Provision of the Michigan Constitution, the Michigan Supreme Court, relying upon Michigan Constitutional standards (*Manistee Bank & Trust Co.* v. *McGowan*, 394 Mich 655, 232 NW. 2d 636 (1975)) found the classification to bear a substantial relation to the object of the legislation. The Michigan Supreme Court stated:

"We are of the opinion that the challenged classification bears a substantial relation to the object of the legislation: providing a means appropriate to the resolution of disagreements concerning annexation of territory to a city."

"Some territory annexed will be sparsely populated or unpopulated while other territory will be more heavily populated. The challenged classification, responsive to that factual difference, tends to prevent venal abuses which there is reason to believe may occur if few persons (or a small group of persons) have absolute power to prevent an annexation economically advantageous to other persons or the community at large. See *Weber* v. *Thousand Oaks City Council*, 9 Cal 3d 950; 109 Cal Rptr 553; 513 P2d 601 (1973), sustaining against an equal protection challenge a classification providing for a referendum if the area has more than 12 resident registered votes but dispensing with a referendum where there are fewer voters. It was not violative of the Equal Protection Clause to draw a line, and the line drawn (at 100) was not unreasonable." (401 Mich at 666-667; Appendix 85a-86a)

Classifications such as that existing in the instant case with respect to the State of Michigan annexation procedures have been upheld in numerous cases against an equal protection challenge.

In the case of *Adams* v. *City of Colorado Springs*, 308 F. Supp. 1397, aff'd. mem., 399 U.S. 901, rehearing denied 400 U.S. 855 (1970), the annexation statute at issue permitted electors in the area to be annexed to vote on the proposed annexation when the area to be annexed had at least one-sixth but not more than two-thirds contiguity with the annexing municipality. The statute did not permit an election if the area to be annexed had over two-thirds contiguity with the annexing municipality. In rejecting plaintiffs' argument that this statute constituted an arbitrary classification and that there existed no rational basis for the Legislature's distinction, contrary to the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution; the Court stated:

"We are unable to hold that the distinction recognized by the Assembly as to when the franchise may be exercised is unreasonable in light of the manifest purposes for the differentiation. Thus, where the area to be annexed has less than two-thirds contiguity with the annexing city, the interrelationship between the annexed area and the city may not be great enough to warrant a politically undesirable unilateral merger. Where, however, the territory to be annexed has over two-thirds contiguity with the annexing city, the interrelationship between the two areas is or can be so close that the city should be allowed to annex despite the unwillingness of the residents of the annexed territory. The law thus recognizes that a municipality such as Colorado Springs is severely handicapped by an annexation law which requires the approval of the property owners and qualified electors of an annexed area. It is unable to deal with groups of citizens who form small tax colonies on the borders of the core city which is the economic base of the urban area and to which the colonies owe their very existence and yet pay nothing for the advantages which the city provides. These people would seldom consent to the annexation and their non-consent would threaten the very existence of the core city."

"There are governmental as well as economic implications. The metropolitan area is a single social and economic unit, yet it has no consolidated government. Governmental consolidation permits a united approach to solving the problems and supplying the needs of the urban area, in terms of planning and rendition of service as well as fiscal balance."

In the case of *Weber* v. *City Council of Thousand Oaks,* 9 C. 3d 950, 513 P 2d 601 (1973), the annexation statute provided for the right to vote on an annexation if twelve (12) or more voters resided in the area to be annexed. No election was permitted if less than twelve (12) voters resided in the area to be annexed.

In affirming the constitutionality of the annexation procedure, the *Weber* Court stated:

"The Legislature may reasonably have concluded in such situations that the expense of annexation election procedures (see §§ 35016, 35123-35133) or the governmental interest in avoiding tiny pockets of unincorporated territory outweigh considerations in favor of obtaining a majority vote of the residents. (Cf. *Olson* v. *City of Hawthorne* (1965) 235 Cal. App. 2d 51, 54-55 [45 Cal. Rptr. 48].)"

"A legislative classification may satisfy the traditional equal protection test without being the most precise possible means of accomplishing its legislative purpose. Only a reasonable relationship to that purpose is required. (*Whittaker* v. *Superior Court* (1968) 68 Cal. 2d 357, 370-371 [66 Cal. Rptr. 710, 438 P.2d 358].) The definition of 'uninhabited territory' in the 1939 act (§ 35303) is sufficiently related to the legitimate purposes to satisfy equal protection requirements."

Also see *Thompson* v. *Whitely,* 344 F. Supp. 480, 485 (1972); *Murphy* v. *Kansas City, Missouri,* 347 F. Supp. 837 (1972); *Doyle* v. *Municipal Commission of the State of Minnesota,* 340 F. Supp. 841 (D.C. Minn., 3rd Div., 1972); *Forks* v. *City of Warsaw,* 273 NE2d 856 (Ind., 1971); *City of Montecello* v. *Adams,* 200 NW2d 622 (1972).

In the case of *Town of Lockport, New York* v. *Citizens for Community Action at the Local Level, Inc.,* 430 U.S. 259 (1977), relied upon by Appellants herein, this Court recognized that there are differences in the interests of voters residing in a city and those not residing in a city and that a legislative classification differentiating between voters in these entities is not violative of equal protection standards.

The New York municipal scheme of cities, villages and towns is comparable to that existing in Michigan. The recognition by this Court in *Lockport* that voters in cities and towns have differing interests is also applicable to the rec-

ognition by the Michigan legislature that the interests of cities may be different than the interests of sparsely populated township areas with respect to annexation proceedings. Setting forth statutory classifications with respect thereto is not constitutionally prohibited.

It is also well to keep in mind that in many of the annexation procedures challenged in the aforecited cases, there was no statutory provision for review of the proposed annexations. This is to be contrasted with the Michigan annexation procedures whereby the Michigan State Boundary Commission, acting pursuant to statutory criteria, must approve the proposed annexation, even where no right of referendum is permitted.

Thus, Appellants' allegations in their Jurisdictional Statement to this Court that cities in Michigan have unfettered discretion to annex townships at their will is untrue. For example, Table I, set forth at page 43 of Appellants' Jurisdictional Statement demonstrates that out of one hundred five (105) petitions for annexation submitted to the Michigan State Boundary Commission between 1971 and Feb. 15, 1978 which reached a final resolution, only fifty-three (53) of such petitions were approved, while twenty-eight (28) petitions were denied and twenty-four (24) petitions were rejected due to legal and formal errors.

Appellants have raised no substantial Federal question as to the constitutionality of 1970 PA 219. The Decisions of this Court, of lower courts in the Federal system, and of state courts are consistent in holding that statutory annexation procedures similar to that existing in Michigan have a reasonable basis and are not violative of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

Appellee, City of Novi, submits that the instant Appeal should be dismissed, or in the alternative, that the Decision of the Michigan Supreme Court be affirmed.

CONCLUSION

WHEREFORE, for the reasons hereinbefore stated, Appellee, City of Novi, respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Michigan.

Respectfully submitted,

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